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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/938,455	08/24/2001	Jessica Weiss Goldberg	J6709(C)	2226

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EXAMINER

BOYER, CHARLES I

ART UNIT	PAPER NUMBER
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1751

DATE MAILED: 03/09/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/938,455	<b>Applicant(s)</b> GOLDBERG ET AL.	
	<b>Examiner</b> Charles I. Boyer	<b>Art Unit</b> 1751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2005.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 29,30,32,33,36-42 and 44-61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 29,30,32,33,36-42 and 44-61 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

This action is responsive to applicants' request for continued examination received December 12, 2005. Claims 29, 30, 32, 33, 36-42, and 44-61 are currently pending.

#### ***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

1. Claims 29, 30, 32, 33, 36-38, 44, 46-52, 54-56, and 61 are rejected under 35 U.S.C. 102(e) as being anticipated by Lukenbach et al, US 2002/0122772

Lukenbach et al teach a self-foaming cleansing gel comprising 9% isobutane and isopentane foaming agents, and 91% of a cleansing composition comprising 22.7% anionic surfactant, 10.9% cocoamidopropyl betaine, 0.5% glycerin, 1.8% isopropyl palmitate, and 45.8% water wherein the composition is filled in a piston can (page 5, example 2). Preferred viscosities of these compositions may be as high as 100,000 cps

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2. The rejection of claims 29, 30, 32, 33, 36-41, 44, 45, 51, 54, and 61 under 35 U.S.C. 102(b) as being anticipated by Chaussee, US 5,334,325 is withdrawn in view of applicants' amendment and response.

3. The rejection of claims 29, 30, 32, 33, 36, 38-40, 44-50, 54, and 61 under 35 U.S.C. 102(b) as being anticipated by George et al, US 5,500,211 is withdrawn in view of applicants' amendment and response.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 29, 30, 32, 33, 36-41, 44-46, 51, 54-56, and 61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chaussee, US 5,334,325.

Chaussee teaches post-foaming gels dispensed from a piston can (see abstract). An example of such a composition comprises 22.5% phosphate ester anionic surfactant, 1.47% oleyl betaine, 0.5% ethoxylated alcohol, propylene glycol, cyclomethicone, 50% water, and a pentane/isobutane foaming agent (col. 9, example 7). Suitable emollients of the invention include petrolatum and mineral oils as well as fatty acid esters such as isopropyl myristate and isopropyl palmitate (col. 4, lines 29-47). Chaussee does not specifically teach a composition containing a fatty acid ester

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emollient, however, as fatty acid ester emollients are clearly contemplated by the reference, it would have been obvious to one of ordinary skill in the art to add them to example 7 and render obvious the claims at hand. The examiner acknowledges that the reference and applicants may be adding the fatty acid ester for different purposes, emollient and structurant respectively, but the reference's reason for adding a fatty acid ester is immaterial, so long as it would be obvious to add it. With respect to the viscosity claimed, the examiner notes the reference teaches a gelled composition. It is well known in the art that gels typically have viscosities ranging from about 20,000 to 2,000,000 cps. As the claimed viscosity of 40,000 cps is well within this range, the examiner maintains one of ordinary skill in the art, well aware of typical viscosities for gels, would formulate the gel composition of the reference within this range and render obvious this limitation. With respect to the presently claimed composition being structured, note that example 7 contains an ethoxylated alcohol, a well-known structurant, and so the examiner maintains this limitation is satisfied.

2. Claims 29, 30, 32, 33, 36, 38-41, 44-50, 54-56, and 61 rejected under 35 U.S.C. 103(a) as being unpatentable over George et al, US 5,500,211.

George et al teach self-foaming shaving gels (see abstract). An example of such a composition comprises 7.5% myristoyl sarcosinate, 1% ethoxylated alcohol, myristyl alcohol, 4.5% mineral oil, hydroxyethyl cellulose, hydroxypropyl cellulose, polyquaternium-10, 74.5% water, and an isopentane/isobutane foaming agent wherein the composition is dispensed in a piston can (referred to in the example as a barrier-

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type aerosol container) (col. 5, example 4). Suitable emollients of the invention include fatty acid esters such as isopropyl myristate (col. 4, lines 27-30). George et al do not specifically teach a composition containing a fatty acid ester emollient, however, as fatty acid ester emollients are clearly contemplated by the reference, it would have been obvious to one of ordinary skill in the art to add them to example 4 and render obvious the claims at hand. The examiner acknowledges that the reference and applicants may be adding the fatty acid ester for different purposes, emollient and structurant respectively, but the reference's reason for adding a fatty acid ester is immaterial, so long as it would be obvious to add it. With respect to the viscosity claimed, the examiner notes the reference teaches a gelled composition. It is well known in the art that gels typically have viscosities ranging from about 20,000 to 2,000,000 cps. As the claimed viscosity of 40,000 cps is well within this range, the examiner maintains one of ordinary skill in the art, well aware of typical viscosities for gels, would formulate the gel composition of the reference within this range and render obvious this limitation. With respect to the presently claimed composition being structured, note that example 4 contains an ethoxylated alcohol and a fatty alcohol, well-known structurants, and so the examiner maintains this limitation is satisfied.

Claims 29, 30, 32, 33, 36, 38, 44, 45, 47-51, 54, and 61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marchesi et al, US 6,682,726.

Marchesi et al teach self-foaming shaving lotions (see abstract). An example of such a composition comprises 10.78% sarcosinate anionic surfactant, 0.53%

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carrageenan gum, glycerin, 78.57% water, and an isopentane/isobutane foaming agent wherein the composition is dispensed in a piston can (referred to in the example as bottom-gassed cans) (col. 5, example 8). Suitable emollients of the invention include paraffinic hydrocarbons and mineral oils as well as fatty acid esters such as isopropyl myristate (col. 4, lines 44-51). Marchesi et al do not specifically teach a composition containing a fatty acid ester emollient, however, as fatty acid ester emollients are clearly contemplated by the reference, it would have been obvious to one of ordinary skill in the art to add them to example 8 and render obvious the claims at hand. The examiner acknowledges that the reference and applicants may be adding the fatty acid ester for different purposes, emollient and structurant respectively, but the reference's reason for adding a fatty acid ester is immaterial, so long as it would be obvious to add it. With respect to the viscosity claimed, the examiner notes the reference teaches a thickened lotion having an elastic modulus of from 200,000 to 900,000 cps (col. 6, claim 4).

Applicants have traversed this rejection on the grounds that Marchesi. et al. is not a valid 35 USC 103(a) reference because of its later publication date. The examiner notes the filing date of the reference is prior to the filing date of the present application and the reference is therefore valid.

Claims 29, 30, 32, 33, and 36-42, and 44-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sporri, US 5,127,556 in view of Dixon, US 6,407,044.

Sporri teaches piston can formulations (see abstract). Sporri teaches that piston cans are particularly well suited and in wide use for post-foaming shaving gel products

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(col. 1, lines 10-38). Sporri does not teach the specific post-foaming compositions of the present claims. Dixon teaches aerosol personal cleansing compositions (see abstract). An example of such a composition is a shower gel base comprising 4.73% sodium lauryl ether sulfate, 3% glycerin, 5.25% lauroamphoacetate, 2.43% palm kernel fatty acid, 0.4% cationic polymer, and the balance water wherein the base is dispensed in a pressurized mixer containing 85-97% base and 3-15% propellant (col. 15, example I). Another example comprises 5.13% sodium lauryl ether sulfate, 0.5% trihydroxystearin, 1.43% lauroamphoacetate, 0.3% cationic polymer, 5% petrolatum, 7.5% soybean oil, and the balance water wherein the base is dispensed in a pressurized mixer containing 85-97% base and 3-15% propellant (col. 15, example F). Note that the viscosity of these compositions may be as high as 100,000 cps (col. 11, lines 30-44). With respect to the present compositions being present in a lamellar phase, as fatty acids are well known in the art as lamellar structurants, the examiner maintains these examples will inherently exhibit this property.

It would have been obvious to one of ordinary skill in the art to package the composition of Dixon in a piston can and so meet the limitations of the claims at hand as Sporri teaches that piston cans are particularly well suited and in wide use for post-foaming shaving gel products.

Applicants have traversed this rejection on the grounds that Dixon does not exhibit the viscosity presently claimed and have submitted a declaration in support of this assertion. While the examiner accepts the findings of the declaration and acknowledges that the exemplified compositions do not have a viscosity in the presently



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claimed range, as the reference teaches that the viscosity of the compositions may be as high as 100,000 cps, the examiner maintains it would be obvious to one of ordinary skill in the art to formulate a composition within the presently claimed range. The test for obviousness is what the teachings of a prior art reference as a whole would have suggested to one of ordinary skill in the art. All of the disclosure of a prior art reference must be considered for what it would have fairly suggested to one of ordinary skill in the art and such consideration is not limited to the specific details or examples described in the prior art reference. Therefore, even if conclusive evidence was presented in the declaration that compositions do not have the viscosity claimed, such a composition would still be an obvious choice in view of the disclosure of Dixon, which teaches applicants' preferred viscosity range. The fact that the reference does not exemplify the claimed viscosity does not negate obviousness. Accordingly, the rejection is maintained.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Charles I. Boyer whose telephone number is 571 272 1311. The examiner can normally be reached on M-Th 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on 571 272 1029. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Charles I Boyer  
Primary Examiner  
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